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American Tire Distributors, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

AMERICAN TIRE DISTRIBUTORS,
INC., a Delaware corporation,

Plaintiff,

v.

AMERICAN TIRE CORPORATION,
unincorporated business with an address
in El Monte California, ABRAHAM
HENGYUCIUS, a individual and DOES
1 THROUGH 10,

Defendants.

CASE NO.: CV08-2971 MMM

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF PLAINTIFF
AMERICAN TIRE
DISTRIBUTORS, INC.'S
OPPOSITION TO MOTION
TO SET ASIDE DEFAULT**

Date: March 2, 2009
Time: 10:00 a.m.
Before: Honorable Margaret M.
Morrow
Location: Courtroom 780

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I. INTRODUCTION

Plaintiff American Tire Distributors, Inc. (“ATD” or “Plaintiff”) opposes Defendants’ Motion to Set Aside Default.¹ Under Federal Rule of Civil Procedure 55(c), the entry of default may only be set aside if Defendants establish “good cause” for doing so. In their papers dated January 9, 2009 and filed January 14, 2009, Defendants assert that they were not properly served and did not receive notice of this action until “recently.” The facts show otherwise, including proofs of service that Defendants were properly served more than six months ago. Moreover, in out-of-court statements, Defendants have admitted to actual knowledge of this action and the entries of default since September 2008.

Even assuming service prior to August 2008 was not proper (which Plaintiff disputes), Defendants did not act promptly to correct the allegedly improper entries of default once they admittedly were aware of this action and were aware of their default status. Defendants did not act promptly to appear in this action even after Plaintiff - in an abundance of caution- again served all of the papers in this action on Defendants on October 6, 2008 by personal rather than substituted service.

Defendants have engaged in a pattern of conduct that demonstrates an unwillingness to comply with the rules and procedures of the Court and a propensity to provide misleading information such as false claims that Defendants’ discovery of this action was “recent” or that Defendant Hengyucius had not been personally served. The Court should hold Defendants responsible for their actions by denying Defendants’ motion to set aside the entries of default and/or by imposing such conditions as are necessary to ensure that Defendants are no longer able to play fast and loose with the rules of the Court.

¹ Defendant American Tire Corporation (“ATC”) and Defendant Abraham Hengyucius (“Hengyucius”) are collectively referred to herein as “Defendants.”

II. FACTUAL BACKGROUND

In 2006 and 2007, ATD sent Defendants cease-and-desist letters requesting that Defendants stop its unfair business practices and activities that infringe on ATD's trademark. These letters were mailed, faxed and emailed to the various addresses in California and New Jersey that could be located for Defendants. *See* Declaration of Kathleen McCarthy In Support of Plaintiff American Tire Distributors, Inc.'s Opposition To Defendants' Motion To Set Aside Default ("McCarthy Decl."), ¶¶ 2-4, Exs. 1-2. Defendants did not respond to these letters and continued to issue press releases using their infringing business name and operate a website with a confusingly similar domain name to ATD's trademark. *Id.* ATD had no choice but to file its Complaint against Defendants for violation of federal trademark law and unfair competition under federal, state and common law. The Complaint was filed May 6, 2008. *Id.*, ¶ 6, Ex. 3 (Dkt. No. 1).

ATD attempted to obtain additional information regarding Defendants in order to serve them with the summons and Complaint. *See id.*, ¶¶ 5, 7. Defendants' website provides contact information consisting of a P.O. Box in Chino, California and phone numbers with California area codes. *See id.*, ¶ 28, Ex. 18. Aside from the limited information on the Defendants' website, public information was difficult to find. *See id.*, ¶ 5. Plaintiff could find no record that Defendant ATC was incorporated or registered to do business in any state and could find no personal address or drivers license information for Defendant Hengyucius, who also appeared to use one or more aliases including "Hengyu Zhang," "Zhang Hengyu," and "Albert Hy." *See id.*

ATD located another case in the Los Angeles County California Superior Court where the proof of service dated March 17, 2008 indicated that Defendant Hengyucius was a registered agent of "American Seashores International, Inc., a

1 corporation a/k/a American Tire Corporation,” with a registered address in El
2 Monte. McCarthy Decl., ¶¶ 8-9, Exs. 4-5. Also, an investigator’s postal trace
3 showed the El Monte address was valid for Defendant ATC. *Id.*, ¶ 8, Ex. 4.
4 Furthermore, Defendants’ websites, trade publications and corporate records
5 indicate that American Seashore is either the same entity or closely associated with
6 Defendant ATC and owned and operated by Defendant Hengyucius. *See id.*, ¶¶ 5,
7 8, 24, Exs. 4, 14.

8 Plaintiff proceeded to serve the Complaint and summons on Defendant ATC
9 at the El Monte address on June 11, 2008. *See id.*, ¶ 10, Ex. 6. Service on
10 Defendant ATC was carried out by delivery of the papers to a woman who
11 identified herself as “Violet.” *See id.* Violet Lee is listed as an account manager
12 for Defendant ATC in a 2007 industry directory. *See id.*, ¶ 11, Ex. 7. The papers
13 were also mailed to Defendant American Tire Corporation at the El Monte address.
14 *See id.*, ¶ 10, Ex. 6. Service was considered effective on June 25, 2008 under Cal.
15 Civ. Proc. Code § 415.20(a).

16 Plaintiff also served, at the same address, the Complaint and summons by
17 substituted service on Defendant Hengyucius on July 10, 2008. *See id.*, ¶ 12, Ex.
18 8. Service on Defendant Hengyucius was carried out by delivery of the papers to a
19 woman who identified herself as “Julie,” a secretary at the office. *See id.* The
20 papers were also mailed to Defendant Hengyucius at the El Monte address. *See id.*
21 That service was considered effective on July 28, 2008 under Cal. Civ. Proc. Code
22 § 415.20(b).

23 After Defendants failed to respond to the Complaint within a 20-day time
24 period, the Clerk entered default against Defendant ATC and against Defendant
25 Hengyucius. *See id.*, ¶¶ 13-14, Exs. 9-10. On August 20, 2008, Plaintiff filed a
26 motion for default judgment against Defendants. *See* Dkt. No. 25.
27

1 Approximately a month after filing and serving its motion for default
2 judgment, some of the papers mailed to the El Monte address were returned in the
3 mail to Plaintiff. *See* McCarthy Decl., ¶¶ 16-17. Plaintiff also became aware that a
4 reporter for a tire industry publication questioned Defendant Hengyucius about this
5 action and Defendant Hengyucius advised the reporter that he had not been served
6 with papers. *See id.*, ¶¶ 15, 18, Ex. 11. Defendants state in the September 22, 2008
7 email, styled as a press release, that it received papers from the reporter and ATC's
8 legal department is going to take action against Plaintiff and its attorneys. *Id.*

9 At that time, out of an abundance of caution, Plaintiff expended significant
10 time and money in re-serving all the papers in the case at all the known mail,
11 email, and fax addresses for Defendants. *See id.*, ¶¶ 25, 33, Exs. 15, 21. On
12 October 6, 2008, all of the papers in this case (including the summons, complaint
13 and the default papers) were successfully served by personal service on both
14 Defendants at an address in Chino, California. *See id.*, ¶¶ 26-27, Exs. 16-17.

15 Ten days later, on October 16, 2008, attorney Maria Tam left a brief
16 telephone message for Plaintiff's counsel. *Id.*, ¶ 19. The next day, Plaintiff's
17 counsel returned the call. *Id.* Ten more days passed without word from
18 Defendants. Plaintiff's counsel then wrote to Ms. Tam, on October 27, 2008,
19 advising her of the service made to date and the pending motion for default
20 judgment and requesting that she enter a formal appearance immediately if she, in
21 fact, represented Defendants in this matter. *See id.*, ¶ 20, Ex. 12.

22 Another ten days passed. Then, on November 6, 2008, Ms. Tam called
23 Plaintiff's counsel and asked if Plaintiff would consider withdrawing the motion
24 for default. *Id.*, ¶ 21. Plaintiff's counsel responded the next day, noting that no
25 reason had been given as to why Plaintiff should withdraw the motion and that due
26 to Defendants' actions, Plaintiff had been forced to prepare and file the initial
27

1 papers in this case, serve the papers in numerous ways, detail the service efforts to
2 the court, and prepare, file and serve the default papers. *See id.*, ¶ 22, Ex. 13. In
3 the same e-mail, Plaintiff's counsel also inquired whether Defendants would
4 consider settling the matter outside of litigation. *See id.*

5 Next, Defendants waited **nearly ten weeks** before doing anything further.
6 *See id.*, ¶ 23. Defendants never bothered to provide any details regarding why
7 Defendants believed the default should be set aside, to respond to Plaintiff's
8 request to discuss settlement, or to file a notice of appearance, and simply filed
9 their instant motion to set aside the entries of default. Defendants' motion papers
10 do not include the required L.R. 7-3 statement that parties conferred regarding the
11 substance of Defendants' motion and, as set forth above, the required L.R. 7-3
12 statement could not be made as no meaningful conference was conducted.

13 Prior to filing this opposition brief, ATD's counsel called Ms. Tam and
14 discussed with her various means of avoiding motion practice on the default issue,
15 including entering into a stipulation to be ordered by the Court whereby
16 Defendants would consent to jurisdiction, waive further service and Defendant
17 Hengyucius would appear for a deposition within a set time, if the case could not
18 be settled. McCarthy Decl., ¶ 30. ATD's counsel also proposed that the parties
19 agree to participate in court-ordered mediation before the Magistrate Judge
20 assigned to this case. *See id.*, ¶ 31, Ex. 19. Another follow-up email was sent and
21 then faxed to Ms. Tam on January 26, 2009. *See id.*, ¶ 32, Ex. 20.

22 Ms. Tam responded after business hours on Monday, January 26, 2009 (the
23 day before the brief was to be filed), leaving messages for Plaintiff's counsel
24 indicating that Defendants would agree to some sort of stipulation allowing the
25 case or proceed in California, but not providing details on what would be
26 stipulated. *See id.*, ¶ 34, Ex. 22. Plaintiff's counsel is attempting to reach
27

1 agreement with Defendants regarding an appropriate stipulation, but was unable to
2 conclude arrangements before the deadline for filing this paper. *See id.*, ¶ 35, Ex.
3 23.

4 III. ARGUMENT

5 An entry of default may only be set aside if Defendants prove “good cause”.
6 Fed. R. Civ. P. 55(c). Upon valid service, Defendants have the burden of
7 demonstrating that good cause exists for lifting the default. *See TCI Group Life*
8 *Ins. Plan v. Knoebber*, 244 F.3d 691, 696 (9th Cir. 2001). The “good cause”
9 analysis considers factors such as whether the defendant’s culpable conduct led to
10 the default; whether the defendant has a meritorious defense; and whether
11 reopening the default would prejudice plaintiff. *Id.* (citations omitted). “These
12 factors are disjunctive, and the district court is free to deny the motion if *any* of the
13 three factors is true.” *Trustees of the S. Cal. IBEW-NECA Pension Plan v. Sabco*
14 *Electrique, Inc.*, No. CV 07-7894 ODW(AJWx), 2008 WL 4297223, at *2 (C.D.
15 Cal. Sept. 15, 2008) (emphasis added) (internal quotations omitted) (citing
16 *American Ass’n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1108 (9th
17 Cir. 2000)), *available at* McCarthy Decl., ¶ 36, Ex. 24.

18 Defendants have not carried their burden. The facts show service of the
19 Complaint and summons was proper and the entries of default against Defendants
20 are valid. Even if initial service of the Complaint and summons is held as
21 defective, Defendants admit having actual notice of this suit and the papers in
22 September 2008. Defendants have not proven any viable reason for their failure to
23 take action in this case from September to January. Defendants’ actions
24 demonstrate that they are seeking to avoid and delay a determination on the merits.
25 Indeed, Defendants’ actions, including the timing and substance of their motion to
26 set aside the default, demonstrate a willingness to ignore the rules and delay this
27

1 action as much as possible. Given Defendants' pattern of activities, it is likely that
2 if the default is lifted, Defendants will continue to take steps to make this case as
3 difficult as possible.

4
5 **A. Service of the Complaint and Summons Was Valid And**
6 **Defendants' Failure To Respond Is Caused By Their Own**
7 **Culpable Conduct**

8 The central focus of the rules regarding service in the Federal Rules of Civil
9 Procedure is that a defendant is given adequate notice of the suit. Trustees of S.
10 Cal. IBEW-NECA Pension Plan, 2008 WL 4297223, at *3, *available at* McCarthy
11 Decl., ¶ 36, Ex. 24. Defendants cannot fairly claim that they did not have
12 sufficient or adequate notice of this action. In fact, Plaintiff's efforts to give notice
13 to Defendants have been above-and-beyond what was necessary in order to provide
14 Defendants with notice of this action. Defendants, by their own failure to act,
15 caused the default to be entered against them. In Defendant Hengyucius'
16 declaration, he attempts to disguise the unexcused delay for their lack of
17 responsiveness by claiming that he only "recently" became aware of this action.
18 This statement is misleading as the proofs of service show Defendants were served
19 more than six months ago with the Complaint and summons and other evidence
20 shows that Defendants admitted to knowledge of the suit and the entries of default
21 more than 3 months ago.

22 ATD complied with the Federal Rules of Civil Procedure in serving
23 Defendants with the Complaint and summons and providing adequate notice to
24 Defendants of this suit. If American Tire Corporation was duly registered to do
25 business in the State of California (or New Jersey), then state records would
26 provide clear information regarding registered agents for service. But apparently
27 Defendants are not operating their business by the books and ATD could find no

1 record that Defendants are incorporated in any state, including the states of
 2 California or New Jersey.² McCarthy Decl., ¶¶ 5, 29. Defendants apparently
 3 operate under multiple identities and aliases, and their suspicious activities have
 4 been followed by various bloggers in the tire trade. *See id.*, ¶¶ 5-6, 8-9, 24, Exs.
 5 3-5, 14.

6 Under Fed. R. Civ. P. 4(h)(1)(A) and Fed. R. Civ. P. 4(e)(1), service of the
 7 complaint and summons is proper under the “state law for serving a summons...in
 8 the state where the district court is located.” *Id.* In this case, Defendants were
 9 properly served under Cal. Civ. Proc. Code §§ 415.20(a) and 415.20(b) by leaving
 10 a copy of the complaint and summons with a person of at least 18 years of age
 11 (who is apparently in charge of the office) and also mailing a copy of the papers by
 12 first-class mail to an address associated with both Defendants. *See* Cal. Civ. Proc.
 13 Code §§ 415.20(a), (b). Service is deemed completed on the 10th day after mailing
 14 under these provisions. *See id.*

15 Specifically, Defendant ATC was properly served at an address in El Monte,
 16 California by leaving a copy of the Complaint and summons with an individual
 17 named by the process server as “Violet” and, thereafter, mailing the papers. *See*
 18 McCarthy Decl., ¶ 10, Ex. 6. Violet Lee is an account manager of Defendant ATC,
 19 and a person “apparently in charge.” *See id.*, ¶ 11, Ex. 7; *see also* Cal. Civ. Proc.
 20 Code § 415.20(a). Similarly, Defendant Hengyucius was properly served at the
 21 same address by leaving a copy of the Complaint and summons with an individual
 22 named by the process server as “Julie,” a secretary who also was someone
 23

24
 25 ² Ms. Tam stated that Defendants had shown her papers indicating they are a
 26 New Jersey corporation, but has not provided a copy of those papers to Plaintiff’s
 27 counsel. McCarthy Decl., ¶ 30. A search of the New Jersey Secretary of State
 28 Corporate Records database shows no entry for American Tire Corporation. *Id.*, ¶
 29 29.

1 “apparently in charge.” *See id.*, ¶ 12, Ex. 8. The papers were also mailed
 2 thereafter. *Id.* Proofs of service were filed with the Court. *See id.*, ¶¶ 10, 12, Exs.
 3 6, 8 (Dkt. Nos. 13, 14, 19). The same address was used for service on Defendant
 4 Hengyucius as a registered agent for “American Seashores International, Inc. a
 5 corporation a/k/a American Tire Corporation” in an unrelated action in California
 6 in 2008 and Plaintiff’s investigations supported the use of this address. *See id.*, ¶¶
 7 5, 8-9, Exs. 4- 5.

8 Also, service was proper under Fed. R. Civ. P. 4(h)(1)(B) which states that
 9 service is effective upon “delivering a copy of the summons and of the complaint
 10 to an officer, a managing or general agent, or any other agent authorized by
 11 appointment or by law to receive service of process and--if the agent is one
 12 authorized by statute and the statute so requires--by also mailing a copy of each to
 13 the defendant.” In this case, the complaint and summons were served upon
 14 “Violet” (an account manager) and “Julie” (a secretary), two officers or agents of
 15 Defendant ATC, and subsequently mailed to Defendants. *See Trustees of the S.*
 16 *Cal. IBEW-NECA Pension Plan*, 2008 WL 4297223, at *3 (holding Defendant
 17 failed to meet its burden of proof that service was ineffective based on service of a
 18 receptionist at office), *available at* McCarthy Decl., ¶ 36, Ex. 24.

19 Defendants’ motion papers notably do not dispute knowledge of Violet and
 20 Julie, the persons who received the service copies of the papers. Defendants’
 21 motion papers also do not dispute that Defendants are connected to the El Monte
 22 address where service was made. Defendant Hengyucius alleges in his declaration
 23 that he was never in the city of El Monte for the past two years, but the evidence
 24 shows the address was listed as a registered address for him as a registered agent of
 25 a related company and was a valid postal address for the company. McCarthy
 26 Decl., ¶ 8, Ex. 4; *see also Resolution Trust Corp. v. Bowen*, No. CV-92-1671-
 27

1 PHX-PGR, 2008 WL 2001270, at *2 (D. Ariz. May 7, 2008) (finding no strong
2 and convincing evidence of non-service in light of the totality of the evidence of
3 record), *available at* McCarthy Decl., ¶ 38, Ex. 26.

4 Plaintiffs are not the only ones who, in light of the evidence available as to
5 Defendants' whereabouts, believed the El Monte address was proper for service.
6 On March 17, 2008, an unrelated plaintiff in a case pending in the California
7 Superior Court of Los Angeles County served Defendant Hengyucius as registered
8 agent at the registered El Monte address for "American Seashores International,
9 Inc. a corporation also known as American Tire Corporation." *See* McCarthy
10 Decl., ¶ 9, Ex. 5. Defendants are also in default in that case. *See id.*, ¶ 9, Ex. 5;
11 *see also* Resolution Trust Corp., 2008 WL 2001270 at *3 (holding evidence shows
12 service was proper when defendant permitted some other default judgments to be
13 taken against him during the general time period relevant to this action), *available*
14 *at* McCarthy Decl., ¶ 38, Ex. 26. American Seashores International, Inc. is a
15 corporation that is believed to be either the same entity or closely associated with
16 Defendant ATC and owned and operated by Defendant Hengyucius. *See id.*, ¶¶ 5,
17 8-9, 24, Exs. 4-5, 14. Defendant Hengyucius is listed as a registered agent at the El
18 Monte address based on corporate records of American Seashore International, Inc.
19 *Id.*, ¶ 8, Ex. 4. A postal trace also showed the El Monte address was valid for
20 Defendant ATC. *Id.*

21 "[A] defendant's conduct is culpable if he has received actual or constructive
22 notice of the filing of the action and *intentionally* failed to answer." TCI Group,
23 244 F.3d at 697 (quotations omitted) (emphasis in original). As shown by the
24 totality of the evidence, Defendants have received actual notice of the filing of this
25 action, and have intentionally failed to answer. The proofs of service show that
26 proper service of the Complaint and summons in this case was executed more than
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1 six months ago at the El Monte address. McCarthy Decl., ¶¶ 10, 12, Exs. 6, 8
2 (Dkt. Nos. 13, 14, 19); *see* Trustees of the S. Cal. IBEW-NECA Pension Plan,
3 2008 WL 4297223, at *4 (denying motion to set aside when though defendant
4 denies receiving notice, “the fact remains that the Proof of Service indicates
5 otherwise”), *available at* McCarthy Decl., ¶ 36, Ex. 24.

6 Moreover, even if Defendants were not aware of this action until being
7 informed of the suit by a reporter at a tire conference as Defendant Hengyucius
8 alleges, that conference was not “recent” but was in mid-September 2008. *See*
9 McCarthy Decl., ¶¶ 15, 18, Ex. 11. Defendants had actual notice of the action at
10 that time, and were personally served with *all* the papers in the case on October 6,
11 2008. *See id.*, Exs. 16, 17 (Dkt. Nos. 43, 44); *see also* Grand Canyon Resort Corp.
12 v. Drive-Yourself Tours, Inc., No. CV-05-03469-PHX-SMM, 2006 WL 1722314,
13 at *4 (D. Ariz. June 22, 2006) (“The Ninth Circuit has relaxed the requirements of
14 Rule 4(h) when defendants received actual knowledge of the litigation pending
15 against them in spite of defects in service”) (citations omitted), *available at*
16 McCarthy Decl., ¶ 37, Ex. 25. Defendant Hengyucius, himself, admits in his
17 declaration that he had actual notice of the litigation and the defaults against
18 Defendants at the time of the trade show, but he neglects to mention that the trade
19 show was in September 2008. *See* Declaration of Hengyucius at ¶¶ 4-5 (Dkt. No.
20 45); *see also* McCarthy Decl., ¶ 18, Ex. 11.

21 Even when Defendants retained legal counsel, Defendants did not move
22 expeditiously. After counsel for Plaintiff attempted to return Ms. Tam’s October
23 26, 2008 call to find out whether she, in fact, was retained by Defendants, there
24 was no response from her for another three weeks and no effort made to file
25 anything in Court for more than two months. *See* Trustees of the S. Cal. IBEW-
26 NECA Pension Plan, 2008 WL 4297223, at *4 (holding delay of two months to file
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any motion or application with the Court seeking relief does not show diligence),
available at McCarthy Decl., ¶ 36, Ex. 24.

These facts show that Defendants' failure to respond was due to Defendants' own actions and not any actions of Plaintiff.

B. Defendants Have Indicated They Will Use the Opportunity Presented by Any Lifting of Default to Further Delay the Proceedings and Prejudice Plaintiff

Defendants' motion papers suggest that Defendants will contest jurisdiction in this Court. *See, e.g.,* Motion to Set Aside Default (Dkt. No. 45) at 5 ("Without waiving their defense that this Court lacks personal jurisdiction...."). Defendants' counsel also stated that jurisdiction was not proper and suggested she may be filing a motion to transfer the case to New Jersey. Any efforts to contest jurisdiction in view of the numerous facts establishing Defendants' firm connection to this forum would appear to be frivolous and patently designed to further delay the proceedings. For example:

- New Jersey has no listings for Defendant corporation;
- Defendants' own website lists a California address and telephone number;
- Industry trade listings for Defendants include a California address and telephone number; and
- Defendants were personally served in this District.

See McCarthy Decl., ¶¶ 11, 26-28, Exs. 7, 16-18.

Defendants failed to respond to Plaintiff's cease and desist letters. *Id.*, ¶ 4. Defendants failed to respond to the summons and Complaint. *Id.*, ¶¶ 13-14, Exs. 9-10. Defendants failed to file their motion to set aside the default for more than three months after admitting knowledge of the action and the pending motion for

1 default judgment. Defendants failed to conduct an appropriate pre-motion
2 conference prior to filing its motion. Defendants delayed their response to
3 Plaintiff's efforts to resolve Defendants' motion until immediately prior to the
4 deadline for Plaintiff's response. *Id.*, ¶ 34. Had Defendants proceeded in
5 accordance with the rules and conducted a genuine pre-motion conference, the
6 time and cost spent on these papers may have been avoided.

7 Plaintiff has taken numerous steps to resolve the dispute and advance the
8 litigation and has met with failures by Defendants at every step. These failures on
9 Defendants' part should not be rewarded.

10
11 **C. Should the Court Set Aside Default, Conditions Should Be**
12 **Imposed to Advance the Case and Ensure Defendants'**
13 **Compliance with the Rules of Procedure**

14 Should the Court grant Defendants' motion, the Court has the power to order
15 such conditions as are necessary to ensure that Defendants comply with the rules
16 such that this case can be resolved promptly. For example, Defendants can be
17 ordered to immediately appear before the Magistrate Judge assigned to this case
18 for court-ordered mediation. Defendants can be ordered to pay Plaintiff's costs
19 and fees. Defendants can be ordered to show cause why it should not be subject to
20 the jurisdiction of the Court. Defendants can be ordered to appear for deposition
21 within a Court-ordered time table. *See Nilsson, Robbins, Dalgarn, Berliner,*
22 *Carson & Wurst v. Louisana Hydrolec*, 854 F.2d 1538, 1546 (9th Cir. 1988)
23 (holding that it is appropriate to condition setting aside a default upon the payment
24 of fees and other appropriate sanctions). In *Nilsson*, the Ninth Circuit held that
25 "[t]he condition most commonly imposed [upon setting aside a default] is that the
26 defendant reimburse the plaintiff for costs incurred because of the default." *Id.*
27 (citations omitted). "By conditioning the setting aside of a default, any prejudice

1 suffered by the non-defaulting party as a result of the default and the subsequent
2 reopening of the litigation can be rectified.” Id. (citations omitted).

3 Under the circumstances, Defendants should be ordered to pay Plaintiff for
4 the costs and fees incurred in the second round of service of process, and in
5 preparing and filing the motion for default judgment and the response to the
6 subject motion. ATD also believes that an order for mediation before the
7 magistrate judge will be the only effective way to get Defendants, who have
8 already ignored cease and desist letters, service of process, and the pre-motion
9 conference rules, to seriously address Plaintiff’s complaint. An order from the
10 Court requiring mediation between the parties within 30 days of its ruling on this
11 motion would prevent Defendants from further evading legal process.

12 As such, if the Court should decide to set aside the entries the default, ATD
13 respectfully requests that at a minimum the Court require:

14 1) Defendants file an answer to the complaint within 20 days from the Court
15 Order;

16 2) mediation as the next step in this case to take place within a short period
17 of time, such as 30 days from the Court Order, under Settlement Procedure No. 1
18 of L.R. 16-15.4;

19 3) Defendant Hengyucius to appear for deposition within a set time period
20 such as 2 weeks after the mediation if mediation is not successful;

21 4) assuming Defendants are not willing to consent to jurisdiction,
22 Defendants to show cause why they should not be subject to the jurisdiction of this
23 Court in light of the contact information listed their website showing a significant
24 presence in this District and the personal service achieved in this district; and

25 5) Defendants to pay fees and costs of the litigation to date caused by the
26 delay in Defendants’ appearance and by Defendants’ failure to conduct an
27

1 appropriate pre-motion conference. This would include the costs and fees
2 associated with preparing and filing the motion for default judgment, the costs of
3 the second round of service in October 2008, and the costs and fees associated with
4 preparing and filing these papers. Plaintiff will provide an accounting to the Court
5 upon such an order.

6 IV. CONCLUSION

7
8 Because Defendants have made it clear through the course of this dispute
9 that they choose not to abide by the rules of fair legal process and will continue to
10 cause delays, Plaintiff respectfully requests that the Court deny Defendants'
11 Motion to Set Aside Default Entered Against Defendants. In the alternative,
12 Plaintiff respectfully requests that the Court order mediation, payment of fees and
13 costs, and such other conditions as the Court may deem appropriate to ensure
14 Defendants' compliance with the rules.

15
16 DATED: January 27, 2009

KING & SPALDING LLP

17
18 /s/ Lisa Kobialka

Lisa Kobialka

19
20 Attorney for Plaintiff

21 AMERICAN TIRE DISTRIBUTORS, INC.
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